convict him of the crime." In *State* v. *Marler*, 2 Ala. 43, the court below charged in consonance with the test laid down in *State* v. *Spencer*. This was disapproved of by the Supreme Court, whose language, though somewhat ambiguous, received a decisive interpretation in *State* v. *Bringyea*, 5 Ala. 241, when GOLDTHWAITE, J., explained the charge of the court below, to mean that if the jury had a reasonable doubt of sanity, they must acquit; and so interpreted, affirmed it according to *Marler's Case*. Several other authorities to the same effect are cited by VALENTINE, J., in the principal case, and in the excellent note in the first volume of Bennett & Heard's Leading Criminal Cases to *Com.* v. *McKie*; in which the distinction between a *primâ facie* case and the burden of proof is clearly indicated: while the arguments upon which this class of cases proceeds will be found perspicuously set forth in the opinion of WILDE, J., in the leading case of *Com.* v. *York*, *supra*. R. S. H.

United States Circuit Court. District of Kentucky.

BANK OF KENTUCKY *v.* ADAMS EXPRESS COMPANY.

Where the receipts, or bill of lading, used by an express company, contain limitations upon its responsibility for the transportation of goods or parcels committed to its charge, unless the consignee elects to pay a higher rate to insure safe delivery, and this is known to the agent of the owner, who fills up the bill of lading at the lower rate of charge, and presents it to the express agent for signature, this will be sufficient evidence to affect the owner with notice of the nature of the limitations upon the responsibility of the carrier, without inquiry whether such agent did in fact know the extent of such limitations.

Where an express company accepts a parcel for transportation over its line, with an exemption from responsibility for loss by fire, and the same is destroyed by fire, by the burning of one of the railway bridges upon the line, it is not material, whether such fire occurred through the culpable negligence of the railway company, or not, since, if the owner of the goods knew, at the time he accepted the bill of lading, with exemption from responsibility for loss by fire, that the carrier would have to pass over the railway, in the course of the transportation, he cannot hold the carrier responsible for the misconduct of the railway company.

THIS was an action on the case for negligence. There was a verdict for defendant, and plaintiff now moved for a new trial. The facts are stated in the opinion.

J. M. Harlan, and *Barr, Goodloe & Humphrey*, for plaintiff.

Isaac Caldwell and *G. C. Wharton*, for the defendant.

BALLARD, J.—The facts in the case are substantially as follows: The Southern Express Company and the Adams Express Company are engaged each in the business of carrying money and other articles from one part of the country to another for hire, at the request of any one who offers such articles to them for carriage. They do not use in their business any vehicles of their own except such as are required to transport the articles intrusted to them, to and from railroad depots, and to and from steamboat landings. They use railroads, steamboats and the

other public conveyances of the country. These conveyances are not subject to their control, but are governed entirely by the companies and persons to whom they belong. The packages intrusted to them are at all times, while on these public conveyances, in the care of one of their own messengers or agents. These companies are engaged in carrying by the railroads, through Louisiana and Mississippi to Humboldt, Tenn., and thence over the Louisville and Nashville Railroad to Louisville, Ky., under a contract by which they divide the compensation in proportion to the distance the article is transported by the respective companies. Between Humboldt, Tenn., and Louisville, Ky., both companies employ the same messenger; but this messenger south of the northern boundary of the state of Tennessee is subject entirely to the orders of the Southern Express Company, and north of that boundary is subject entirely to the orders of the Adams Express Company.

These express companies are in the habit of charging one price when they undertake to insure the safe delivery of the articles intrusted to them—that is, when they do not modify their ordinary responsibility as common carriers, and of charging another and lower price when their responsibility is limited. The Louisiana National Bank was aware of these regulations, and had in its possession printed blank receipts, or bills of lading, showing in the body the conditions and exceptions upon which the companies would undertake to carry at the lower rate, and in the margin the printed blank for the rate at which they would insure. Having received a letter from the plaintiff directing the forwarding by express of the sum of $13,528 15, the bank, by its teller, filled the blanks in that part of the bill of lading which contained the conditions and exceptions, and presented it to the Southern Express Company for its signature and delivered the package of money addressed to the plaintiff without stating who was the owner. The bill of lading was signed and redelivered to the teller of the National Bank, and forwarded by him to the plaintiff at Louisville. It does not appear that the receipt was read at the time of its delivery, or that the attention of the officers of the Louisiana National Bank was called specially to the exceptions contained in it, but, as before stated, the bank was aware of these exceptions and of the stipulations for the lesser rate of compensation.

This package was carried by the Southern Express Company from New Orleans to Humboldt, Tenn., and there delivered to the joint messenger of the Southern and Adams Express Companies. While it was in the custody of this messenger between Humboldt and the northern line of the state of Tennessee, the car in which the package was contained was precipitated through a trestle-work on the line of the Louisville and Nashville Railroad, at or near Budd's creek, and the car and package were destroyed by fire. This was caused by the fallen locomotive, without any fault or neglect on the part of the messenger who had charge of the package.

So much of the receipt as is material to the present controversy is as follows:

"SOUTHERN EXPRESS COMPANY,
"*Express Forwarders,*

"No. 2—$13,528.15. July 26, 1869.

"Received from the Louisiana National Bank one package, sealed and said to contain $13,528.15, addressed 'Bank of Kentucky, Louisville, Kentucky.'

"Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and there deliver the same to other parties to complete the transaction, such delivery to terminate all liability of this company for such damage; and also that this company are not to be liable in any manner, or to any extent, for any loss or damage * * * of such package or of its contents * * * occasioned * * * by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person, to whom the Southern Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of such other company or person."

Upon these facts the court charged the jury:

First—That the Southern Express Company and the Adams Express Company are common carriers.

Second—That the Adams Express Company is liable for the loss of packages delivered to the joint messenger of the two companies at Humboldt, Tenn., although the loss occur south of the southern boundary of the state of Tennessee.

Third—That if the jury believe the facts above detailed in relation to the execution of the receipt, then it, thus signed and delivered, constitutes the contract, and all the exceptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not; and the plaintiff is bound by this contract, whether it expressly authorized the Louisiana National Bank to make it or not.

Fourth—If the bill of lading contained no exception, it is clear that the defendant would not be excused because the accident occurred without its fault. It would be the insurer, and therefore accountable. But the bill of lading, among other exceptions, contained this: "That the company are not to be liable in any manner, or to any extent, for any loss or damage * * * of such package or its contents * * * occasioned * * * by fire."

"Now, if you believe that the package was destroyed by fire, as above indicated, without any fault or neglect on behalf of the messenger or the defendant, the defendant has brought itself within the terms of the exception, and it is not liable. It is not material to inquire whether the accident resulted from the want of care, or from the negligence of the Louisville and Nashville Railroad and its agents or not, since the uncontroverted testimony shows that the car and train in which the messenger of the Adams Express Company was transporting the package belonged to the Louisville and Nashville Railroad Company, and were exclusively subject to its control and orders. A common carrier who has not limited his responsibility, is undoubtedly responsible for losses, whether occurring on vehicles controlled by himself exclusively, or belonging to and controlled by others, because he is an insurer for the safe delivery of the article which he has agreed to carry; but, when he has limited his liability so as to make himself responsible for ordinary care only, and the shipper, to recover against him, is obliged to aver and prove negligence, it must be his negligence or the negligence of his agents, and not the negligence of persons over whom he has no control."

"If in his employment he uses the vehicles of others over which he has no control, and uses reasonable care—that is, such care as ordinarily prudent persons engaged in like business use in selecting the vehicles, and if the loss arises from a cause against which he has stipulated with the shipper—he shall not be liable for the same unless it arises from *his* want of care, or the want of care of his employees.

"Without, therefore, deciding whether or not the evidence adduced in the case tends to establish any want of reasonable or ordinary care on the part of the Louisville and Nashville Railroad Company, I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it—that is, give no more effect to it than if it had not been adduced."

The first and second instructions were not excepted to, but the third and fourth were. At the trial the plaintiff insisted that it was not bound by the terms of the receipt, because it was not shown that the attention of the Louisiana National Bank was called to them at the time, or that it expressly assented to them, but I am of opinion that there was no error in this portion of the charge. The Louisiana National Bank was aware that the receipt contained some exceptions and conditions. It accepted the receipt without remonstrance or objection, and both authority and reason demonstrate that the receipt must under these circumstances be regarded as constituting the contract of the parties: *Dorr* v. *N. J. Steam Navigation Co.*, 1 Kernan 485; *Wells* v. *The Steam Navigation Co.*, 4 Selden 375, and 2 Comstock 204; *Richard Grace* v. *Alvin Adams, &c.*, 100 Mass. 505; *Halford* v. *Adams*, 2 Duer 480; *York Co.* v. *Central R. R.*, 3 Wallace 107.

It is now everywhere admitted that a common carrier may limit his responsibility by express contract, and if he may make an express contract with a shipper of goods, I cannot see why the contract may not be shown by the same evidence which would establish a contract between other parties. I cannot see why a writing delivered by a common carrier to an owner of goods intended by the former to express the terms and conditions of his contract to carry, and received by the latter as such, should not constitute the contract between them.

A common carrier, it is true, is bound to carry all articles within the line of his business upon the terms and conditions imposed by law, if the shipper shall so demand. He has, however, a right to charge in proportion to the risk assumed by him. It is upon this ground the authorities hold, that unless his responsibility is modified by express contract, his undertaking to carry is upon the terms and conditions which are imposed by law. But when he has undertaken to carry at a less rate than he would have a right to charge, and would charge, if he undertook to carry only upon the conditions imposed by law, and has, by his receipt, delivered to the shipper stipulated for a reasonable limitation of his responsibility, and the shipper has accepted the receipt without objection, the latter is as much bound by the contract thus made as any other party would be.

The correctness of the propositions contained in the remaining portion of the charge to which exception was taken may, I think, be demonstrated in two ways:

First—By the contract between the Bank and the Express company it was agreed that the company should not be responsible for any loss or

damage of the package which should be occasioned by fire. The loss of the package was occasioned by fire; hence the carrier, by the terms of the contract, is not responsible. It is not pretended that the contract was violated by using the cars of the Louisville and Nashville Railroad Company to transport the messenger and the package, or was violated in any other respect. It follows, therefore, that, if the company is liable at all, it is not so by virtue of the contract, but in spite of it.

The contract, however, does not attempt to exempt, nor could it have exempted, the Express Company from loss occasioned by the neglect of itself or its servants, but when it is sought to charge the company with neglect, it must be such neglect as it is responsible for upon the general principles of law.

Now, upon those principles, no one is responsible for damage occasioned by neglect unless it be the neglect of himself, or his servants or agents. But the facts stated show that neither the company nor its servant was guilty of any neglect. It follows that the defendant cannot be charged on this account. Though the defendant used the Louisville and Nashville Railroad to transport its messenger and the package, the railroad company was not, in any legal sense, the servant of the defendant. The defendant had no control over the railroad company or over its servants. The railroad company was no more the servant of the defendant than it is of any passenger whom it transports. It was no more the servant of the defendant than is the hack or cab the servant of him who hires it to transport him from one part of the city to another.

Second—All the authorities agree that when a common carrier has, by special contract, limited his responsibility, "he becomes, with reference to that particular transaction, an ordinary bailee—a private carrier for hire," or, "reduces his responsibilities to those of an ordinary bailee for hire:" *York Co.* v. *Central R. R.*, 3 Wallace 107; *N. J. Steam Navigation Co* v. *Merchants' Bank*, 6 Howard 382; *Railroad Co.* v. *Lockwood*, 17 Wallace 357.

I prefer the latter form of stating the proposition, because it is less misleading. I do not think that a common carrier, by entering into a contract limiting his responsibility, changes his character. He still remains a common carrier, with his responsibility limited in respect to the matter embraced in his contract, to that of an ordinary bailee for hire. The authorities are equally clear that an ordinary bailee for hire is bound to only ordinary diligence, and responsible only for losses and injuries occasioned by negligence or want of ordinary care. The defendant did by special contract limit its responsibility, and neither it, nor its servant, the messenger, is chargeable with any neglect or want of care. The loss of the package was occasioned by fire. The contract provides that the defendant should not be liable for a loss so occasioned, and as neither the defendant nor defendant's servant was wanting in care, it follows that it is not responsible for the loss.

Suppose the package had been lawfully intrusted by the Louisiana National Bank to a private person to be carried for hire, and delivered to the plaintiff, and it was contemplated by the parties that such person would transport the package and himself by the railroads, which, it was contemplated, the defendant would use, and the package had been lost under the same circumstances that the package delivered to the defendant was lost, would it for a moment be contended that such private person would be responsible?

Suppose again, that a person should deliver to his friend, who contemplated coming from New Orleans to Louisville by the ordinary modes of travel, a watch, to be carried and delivered at the latter city, and that while such private carrier, without reward, was proceeding on his way in one of the cars of the Louisville and Nashville Railroad Company, the car should, by the gross carelessness of those having charge of it, be thrown from the track, and the watch in charge of the carrier, without any neglect on his part, destroyed. Is it conceivable that such carrier would be responsible for the loss? To hold that he would be responsible would not only violate the plainest principles of law, but would shock the common sense of mankind, and yet, not only the private carrier for hire, but the private carrier without reward is responsible for the loss of a package intrusted to him, under the circumstances supposed, if the defendant is responsible for the loss of the package claimed in this case.

The private carrier for hire is responsible for losses and injuries occasioned by want of ordinary care on his part or on the part of his servants; and a private carrier without pay is responsible, if not for want of ordinary care, certainly for gross neglect. It cannot be maintained with the least show of reason that the Louisville and Nashville Railroad was any more the servant of the defendant in transporting the package sued for in this case than it is the servant of the carrier for hire, and the carrier without hire in the cases supposed, and if these last are not responsible for the neglect of the servants of the railroad company, it is impossible to conceive that the defendant is responsible for such neglect.

The counsel for the plaintiff attempt to escape this conclusion by insisting that, though the defendant limited its responsibility, it still remains a common carrier, and that such carrier is responsible not only for any want of negligence of himself and his servants, but for the negligence of any agency which he may employ in his business.

This proposition is misleading. It is not strictly correct to say that a common carrier is responsible for the negligence of any agency in his business, or even for his own negligence or that of his servants, in the sense in which his responsibility is distinguished from the responsibility of another person. A common carrier is bound to deliver goods intrusted to him, unless prevented by the owner, the act of God, or the public enemy. He is, as the law terms him, an insurer for the safe carriage and delivery of goods, subject only to the exceptions above mentioned. If he does not deliver goods intrusted to him, he is responsible, not because the goods were lost by his neglect, or the neglect of a servant, or by the neglect of some agency which he employed, but because he insured their delivery. His responsibility is wholly independent of the neglect of any one. If goods delivered to him to be carried are lost while in his or his servants' custody, or while in the custody of some other person who is not his servant, he is equally responsible, not because he is liable upon any principle of law for the negligence of any person who is not his servant, but because he is bound by law to carry and deliver safe all goods delivered to him unless prevented as before stated by the owner, the act of God, or the public enemy. If he has limited his responsibility by special contract, and the loss has been occasioned by the cause excepted in the contract, then the owner in order to charge him must show that though the loss arose

directly from the cause excepted, that cause itself was occasioned by the neglect of the carrier. But, when a public or private carrier is sought to be charged with a loss occasioned by his neglect, when neglect is the foundation of the plaintiff's claim, I am not aware that he is liable for any negligence, except upon the same principles, and under the same circumstances, that any other person is liable. I am not aware that he, more than any one else, can be made responsible for the negligence of persons who are not his servants.

Undoubtedly the defendant did, notwithstanding its contract, continue to be a common carrier, but its responsibility was limited to that of an ordinary bailee for hire. Now, an ordinary bailee for hire is responsible for only ordinary care, and liable for the neglect of himself or his own servants, and not for the neglect of persons over whom he has no control. Consequently he is not responsible for a loss occurring under the circumstances presented in this case. If it be admitted that the common carrier has by his contract limited his responsibility to that of an ordinary bailee for hire, then it cannot be consistently insisted upon that he shall be held liable as a common carrier who has made no express contract. To admit the contract, and to deny any effect to it, is too much for one proposition. The proposition of counsel, reduced to its essence, is simply this: that though the defendant has, by special contract, limited its responsibility to that of a private bailee for hire, it is still responsible as a common carrier. A proposition involving so obvious a contradiction cannot require further exposure.

But obvious as the fallacy and error contained in the counsel's proposition appear to me, the proposition itself seems to be supported by the decision of the Supreme Court of California in the case of *Hooper* v. *Wells, Fargo & Co.*, 27 California 11; by the Supreme Court of Minnesota in the case of *Christenson et al.* v. *American Express Company*, 15 Minnesota Reports 270; and by the learned editor of the American Law Register, in his note to the former case (Law Register, November 1865, p. 30).

In the first case the carrier made a contract stipulating that he would not be responsible except as forwarder. The court construed the contract as limiting the responsibility of the carrier to that of a forwarder —that is, of an ordinary bailee for hire—but they held the carriers responsible for a loss occurring on a tug or lighter which plied between the shore and an ocean steamer, occasioned by the negligence of the managers of the tug, although they were not subject to the control or orders of the express company.

In respect to the responsibility of forwarders, the court say: "They are not insurers like carriers, but they are liable for losses of goods while in their custody, resulting from negligence of themselves, and those they employ in their business of forwarders."

The correctness of the first part of this proposition cannot be disputed, nor do I question the correctness of the latter part, if by "those whom they employ in their business of forwarders" the court mean those who are the forwarders' servants, and subject to their control and orders. The court further say, the responsibility of a forwarder is the same as that of a warehouse-man, and "if a warehouse-man, instead of using his own warehouse, and employing his own subordinates, should, for a stipulated sum, paid to the owner, use in his business the ware-

house of another person, who employs and controls the subordinates, there can be no doubt that he would be liable for a loss of the goods *intrusted to his care*, occurring while in his possession, and resulting from the negligence of such subordinates, although not under his control."

If by the words "intrusted to his care," the court mean to suggest a case where the warehouseman has a contract to keep the goods in his own warehouse, I entirely concur in the proposition stated. But, if they mean that a warehouseman, who violates no contract by removing the goods of his customer from his own warehouse into that of another prudent warehouseman, is responsible for a loss of the goods resulting from the negligence of the subordinates of such other warehouseman, I cannot assent to it.

Suppose a warehouseman's warehouse should be destroyed by fire, it would be his duty to remove such of the goods of his customers as were saved to the warehouse of some other prudent person, and it cannot be insisted that he would be responsible for the loss of goods occurring there, resulting from the negligence of servants of the latter warehouseman.

If a warehouseman contract to keep goods in his own warehouse, and he should remove them—in violation of his contract—to another warehouse, I suppose he would be liable for all losses there occurring, just as a bailee who hires a horse to go to a particular place is responsible for loss or injury to the horse, should he drive or ride him to a different place, and the horse be lost or injured in the prosecution of such other journey.

Again, the court say: "The fact that the defendants made use of various public conveyances, their messenger with the treasure travelling a part of the way by stage, a part by steam-tug and lighters, and a part by ocean steamer, makes no difference as to their liability. For defendants' purposes, the managers of these various conveyances were their agents and employees."

If as seems to be conceded, it was contemplated by both the plaintiff and defendants that the defendants would not use in their business their own vehicles, but the conveyances of others, not at all subject to their control or management, and that in the use of those other conveyances the defendants did not violate their contract, I cannot admit that the defendants, who, by the admissions of the court, were liable only as ordinary bailees for hire, were responsible for losses occasioned by the negligence of the managers of those conveyances. I cannot admit that the managers of those other conveyances were, in any legal sense, their agents and employees. The relation of master and servant, principal and agent, does not and cannot exist where the master has no control over the servant, and the principal no control over the agent.

The court further say: "The defendants had the means of holding the proprietors of those various vehicles used in their business of expressmen responsible to them, had they chosen to do so. If they did not take the proper means to secure themselves, it was their own fault."

But I cannot see how any argument can be drawn from this to show that the defendants were responsible. Every bailee or depositary may hold any one responsible for destroying or injuring goods in his possession, but it cannot be maintained that he is responsible for such destruc-

tion or injury unless he by his negligence contribute to the same. Besides, the plaintiff had his remedy against the proprietors of those other conveyances, which occasioned the loss [see the *N. J. Steam Navigation Co.* v. *Merchants' Bank*, 6 Howard 382], and it might be retorted "that if he did not take the proper means to secure himself, it was his own fault."

In the Minnesota case it was stipulated that the carrier "was not to be held liable for any loss or damage, except as forwarders only, or for any loss occasioned by the perils of navigation and transportation." The goods were received at New York, and were to be delivered to Christinson & Brother, Mankato, Minnesota. When the goods reached St. Paul, they were placed by the carrier on board the steamboat "Julia," a boat belonging to the Northwestern Union Pacific Company, and managed entirely by its officers and servants, to be transported to Mankato. The goods remained in charge of the carrier's messenger. The boat at the time of the accident was strong and in good condition. The carrier was guilty of no want of care in selecting the "Julia" to transport the goods; but on the way the "Julia" was, through the carelessness of its officers and managers, run against a snag and sunk, whereby the goods were damaged.

The court say that the carrier is not exempt from the loss by reason of the stipulation in its bill of lading that "it was not to be held liable for any loss or damage except as forwarders," because, they say: "In our opinion * * * the effect claimed for this clause of the receipt by the defendants is inconsistent with and repugnant to the scope and intent of the result, viewed as a whole, and in connection with the fact showing the defendants' real character and mode of doing business."

In other words, the court held that the defendants were common carriers, and that this clause of their receipt did not modify their liability at all. If the court was correct in this, it is indisputable that this clause did not exempt the carrier from responsibility for the loss claimed.

In respect to the other exceptions, "perils of navigation and transportation," the court says: "The exception does not excuse the carrier for negligently running into perils of the kind mentioned. The proper construction (of such words) is analogous to that which is put upon the words 'perils of the sea' in bills of lading. While thus it would seem very proper to hold that a snag in one of our Western rivers is a peril of navigation, as appears to have been done in Tennessee, if a vessel is wrecked upon one through the negligence of the carrier, or of those whom he employs * * * the carrier is not absolved. Under such circumstances the loss is properly attributed to the agency of man, not to a peril of navigation."

Here again we have the same fallacies and misleading propositions which have been exposed in a former part of this opinion. The sinking of a boat by running on a snag in one of our Western rivers is undoubtedly a "peril of navigation." It is none the less a peril of navigation, though it occur by the fault of the person navigating the boat. It is wholly misleading to say that it is a peril of navigation when it results from accident and without fault, and that it is not a peril of navigation when it results from negligence. When goods are lost by reason of such peril, occasioned by the negligence of the carrier, the carrier is responsible, not because the goods were not lost by an excepted peril,

but because he has brought about the peril through his own carelessness or negligence. He is made responsible for his negligence, not because he is a common carrier, but because he is *guilty* of negligence, and has occasioned loss thereby.

In the books which treat of common carriers, only those carriers are treated of who use their own conveyances; hence it is we often find it stated that the exception, "perils of the sea," or "perils of the river," included in the carrier's bill of lading, does not include losses arising from what would be generally understood to be "perils of the sea," when occasioned by the negligence of the servants of the carrier. In such case, the carrier being the owner of the vessel in which the goods are carried, and being responsible for its careful navigation, it is not material in effect whether it is held that a loss arising from an excepted peril, brought about by his negligence, is not a peril of navigation within the meaning of the bill of lading, or that the carrier is responsible for a loss occasioned by the negligence of his servants; but it is better and more correct to place the liability in such case on the latter ground, because to place it on the former is misleading.

Certainly, as the court say: "The exception does not excuse the carrier for negligently running into perils, * * * nor shall he be heard to set up his own negligence to excuse him from responsibility." But, in the case before the court, no negligence was imputed to the carrier. He did not attempt to set up his own negligence to excuse himself from responsibility. He set up that by the contract he was not to be liable for losses arising from the perils of navigation, and he showed that the loss did arise from a peril of navigation, without any fault on his part. He was not responsible for the negligence of the managers of the boat, as I have before shown, because he had no control or authority over them, and as he could be held responsible in the case only for negligence, it would seem he was not liable at all. I think that the court was misled by the definition of "perils of navigation" which it found in the books.

Clearly, that is none the less a "peril of navigation" or a "peril of the sea" because it is attributable to the agency of man. The very case which is generally used to define and explain what is a "peril of the sea" is that of a collision brought about by negligence. If a carrier's vessel should collide on the sea with another vessel, through the fault wholly of the latter, it is everywhere admitted that he would not be responsible for a loss arising from such collision of goods which he was carrying under a bill of lading that exempted him from responsibility for loss arising from "perils of navigation" or "perils of the sea," and yet, undoubtedly, the collision in such case is attributable to the agency—nay, to the negligence—of man.

I have a profound respect for the opinions of the learned courts, which I have here noticed, but I think that they are opposed to the general current of authorities—that they are founded on fallacious and misleading propositions, and that they disregard the well-settled principles of law.

The motion for a new trial is overruled.

The foregoing case involves two questions of great importance in the law applicable to Express Companies. 1. How far, and in what mode, such com-

panies may restrict their general responsibility by way of special contract or notice. 2. How far such companies are to be held responsible for the conduct of the agencies employed in the transportation.

As to the first question, it seems to be now well settled, that since the parties are not in equal positions, as to the contract of transportation, the owner of the goods being, by stress of circumstances, virtually compelled to assent to the terms demanded by the express agency, it is not competent for such agency to impose any unreasonable terms or conditions upon the contract of transportation. This rule is established in England, as is well known, by statute, the Railway and Canal Traffic Act of 1854, § 7, 17 and 18 Vict. c. 31, whereby it is required that any condition limiting the responsibility of the carrier shall be embraced in a written contract, signed by the consignor or his agent, and shall be reasonable, in the opinion of the judge, before whom any question may arise in regard to it, or it shall not be binding upon the owner of the goods. This statute has been regarded generally, as only defining, with more particularity of detail, what was the law before, upon general principles of equity and justice. This is so declared in the very late case of *New York Central Ry.* v. *Lockwood*, 17 Wallace 357, where it was held, that railway companies cannot demand of those for whom they carry goods, as common carriers, any unjust or unreasonable exemption from responsibility, and that a contract, exempting the carrier from responsibility for the consequences of the negligence of his servants and employees, is of that character and cannot be enforced. In contracts of this character, too, the carrier must assume the burden of showing the assent of the owner of the goods to the terms whereby he claims exemption from his ordinary responsibility. And where the consignor is only informed of the limitations of the contract, by written or printed endorsements upon the receipt or bill of lading, presented to him, for the first time, when he delivers the goods; and he accepts the same with or without signing a counterpart, and has no opportunity for reading the printed endorsement upon the bill, and does not in fact read it, or become aware of its import, it has commonly been held, with great propriety, that such limitations are not binding upon him: *Blossom* v. *Dodd's Express*, 43 N. Y. 264; s. c., 2 Redf. Am. Ry. Cases 86; *Rawson* v. *Railway*, 48 N. Y. 212. But where there is reasonable opportunity to read the conditions upon the bill, it is the duty of the consignor to do so, and if he omit to do so, without some reasonable excuse, he will, nevertheless, be bound by them, if reasonable: *Grace* v. *Adams*, 100 Mass. 505. But see *Am. Express Co.* v. *Schier*, 55 Ill. 140; *Adams Express Co.* v. *Haynes*, 42 Ill. 89. The question is somewhat discussed in 2 Redf. Am. Ry. Cases 223, 227. But where, as in the present case, the plaintiff, or his agent for forwarding the goods, is aware that the carrier makes a distinction in the price of transportation, whether he assumes the full responsibility of insuring a safe delivery, or only that of a limited character, and that these two degrees of responsibility are defined upon the bill of lading, the consignor having the option between them, it is, unquestionably, his duty to state which alternative he will adopt, and if he fills up the bill or allows it to be filled, upon the lower scale of responsibility, he must be considered, as having elected to send his goods upon the terms therein specified, and if he failed to read, or become acquainted with those terms, it was his own fault, and he cannot complain, if the court assume that he did know the terms of the contract.

But as to the view taken by the court in the principal case, in regard to the other question involved, there seems to us

more ground of dissent. This view of the court is certainly presented with great force and argued with great plausibility; but we must say that neither the arguments or the conclusion seem to us quite satisfactory. We feel some hesitation, in undertaking to point out, what seem to us, the fallacies involved in the argument, or the illustrations; for we understand that we are attempting to deal with one, who is no common master of the art of logical deduction, and specially with one who feels entirely sure of the impregnable nature of his position. The learned judge complains, that the cases in the opposite direction, and the arguments by which they are supported, embracing, we suppose, our own humble effort toward that end, to which he refers, so respectfully, are all of a "misleading" character. That may be so, if the contention is founded in error; for nothing is more common, than for one in error, to use misleading arguments in its support, for the best of all reasons, that he has himself first been misled by such arguments, and adopted the error, under the delusion thus produced. And the learned judge will excuse our frankness, in suggesting, that he seems, himself, to us, to have been led to his conclusion somewhat in the same way. His use of the illustration of the private carrier or the private person being intrusted with the custody of this package to carry to Louisville, and the apparently clear conviction which he so exultantly seems to reach, that no one would have the boldness to claim any responsibility on the part of either, for the conduct of the public agencies employed in the transportation, is not calculated to afford much support to the view of the question taken by the court. The sending of the package by a private person, as is sometimes done, has no such analogy to carriage by express companies, as to afford any light in regard to the responsibility of the latter. And the same holds true of any private carrier, without pay. He is not, of course, expected to assume any responsibility except for his own good faith and fair conduct. And the responsibility of a private carrier for pay, depends, altogether upon the nature of the employment. If he is paid by way of *per diem* allowance, or salary, in any form, and for his disbursements, he would not, of course, be responsible for the conduct of any of the agencies employed by him in the transportation, not even the servants, provided he exercised a proper discretion in their selection, for the reason, that upon the employment of such agencies, they would become the agencies of his principal, and the servants would become the servants of the principal, notwithstanding he might have the sole control of their conduct. Under such an employment the carrier would only be responsible for what by the terms of the contract, he was bound to supply, that is his own conduct alone; as that was all he was paid for, by the terms of the contract.

But a private carrier may assume, if he so elect, the responsibility of the entire transportation, from the time he accepts it till its delivery at its destination, and covenant against all risks the same as a common carrier. And if he assumes the entire transportation for a round sum, he thereby assumes the responsibility for all the agencies, employed in the transportation, according to the nature of his own responsibility, that is that of an ordinary bailee, when he covenants against no particular or general risks. The agencies employed in the transportation are his agencies, employed and paid by him, and if the goods are lost, or suffer damages, through the want of ordinary care on the part of any of the agencies employed in the transportation, he is responsible under his contract for the entire transportation. So that this illustration does not make for the

defendants, in the principal case, but rather the contrary. And there is no such analogy between a carrier and a wharfinger or warehousemen, or a forwarder, as to afford any light by the comparison. Express companies have, sometimes, claimed to be merely forwarders, even upon their own lines. But the courts have never listened to this latter claim. It would be an inversion and perversion of the entire nature of the business.

Beyond their own line, they are, as we have said, to all intents, mere forwarders, and only responsible for safe delivery to the next express company. 2 Railw. 27.

But upon their own line the contract of an express carrier is to transport, for a stated price, either prepaid or not, as the parties agree, from the place of acceptance to the place of delivery, or to the next express carrier beyond their own line. There is nothing in the nature of the business, or the implications growing out of the manner of its conduct, which leads, in any sense, to the conclusion, attempted to be maintained in the principal case, that any of the agencies employed in the transportation are at the risk of the owner of the goods. The express carrier hires a car or compartment therein, or he builds and owns it, it is not material which, for in either case it becomes his own, for the time. He contracts with the railway, or steamboat company, to transport his car, or crate, as the case may be, for a round sum, by the trip, or by the year, and in all cases, we presume, stipulates to exempt the company from all responsibility for the transportation, as did Harnden, the founder of this mode of transportation, in the *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 Howard U. S. 344; s. c. 2 Redf. Am. Ry. Cases, 34. "The crate with its contents to be at all times exclusively at the risk of said Harnden;" and he was bound by this contract to so notify his employees, which would scarcely be important now, the custom has become so universal in this class of contracts, to embrace such a stipulation. The agency thus becomes as completely that of the express carrier for the transportation of his own parcels, or freight, which he has assumed to carry for a gross sum, to their destination, or to the end of his line, as if he employed his own locomotive and cars, or a steamboat, and ran a separate train or steamer, for the accommodation of his own business, as must be soon done, upon some routes, if the express business continues to increase as heretofore. It seems to us, that throwing the responsibility of the conduct of all the agencies, in the transportation, upon the owner of the goods is virtually reducing express carriers to the position of mere forwarders, and agents for the transportation, bound to see the goods put upon the trains or boats, and to oversee them during the transit. But the court charged the jury in the principal case, that these companies were responsible as common carriers, which is now the almost universal rule, applied to such companies to the extent of their own lines. If that be so, the fact that the consignor understood, or might have so understood, if he had reflected or inquired, that the express companies would be compelled to employ the agency or assistance of the railway companies in the transportation, is of no importance whatever in determining the question, upon whom rested the responsibility for the conduct of such companies; or rather it has no tendency to show that the express company was not responsible, but the contrary. The question is, not who controlled these agencies, but who employed and paid them? And there can be but one answer to such an inquiry. It was the express company and that alone. How then can it be claimed, with any plausibility, that an agency employed and paid by the express company, and

to do the work of the company, which they have contracted to do, and been paid for doing, is not the agency of the carrier, but of the owner of the goods?

It seems to be considered by the learned judges that the exception in the bill of lading of responsibility for loss by fire possesses some peculiar characteristics, whereby the carrier becomes some other kind of a bailee, so far as loss by fire is concerned. But there can be nothing in this which tends to excuse the defendants in this case. They are still carriers, but not responsible for loss by fire occurring without the fault of the carrier, his servants, agents or employees. This is a condition of the exemption from responsibility which the law implies, notwithstanding the terms of the exemption are general. The exemption in full is that the carrier shall not be held responsible for loss by fire occurring without any improper conduct on the part of any of the agencies of the transportation. And for this purpose the carrier is identified with the conduct of those employed by him in this service. This agency may be called an employee or a sub-contractor. It is not material by what name, or whether the carrier had control of the agency. The contractor for any work who gives it, or a portion of it, into the hands of a sub-contractor to be done, will have no control over the servants or the conduct of the sub-contractor, but he will, none the less, be responsible to the party with whom he made the primary contract for the conduct of the work by all his sub-contractors, whether servants or sub-contractors, as much as for that of his immediate servants. The passenger who is injured by cause of a collision between the train carrying him and one in the opposite direction, owned by another company, through the fault of both trains, cannot recover because he is affected by the conduct of his train, although having no control over it and not in fault himself, because he is identified with the conduct of the company carrying him under the ordinary conduct of passenger transportation. *Thoroughgood* v. *Bryan*, 8 C. B. 115; *Catlin* v. *Hills*, Id. 123. And the rule must be the same where freight is carried upon a railway, whether the person employing the company to make the transportation own the freight or has assumed the transportation by contract; in either case the carrier will be responsible for the conduct of the agency employed by him.

I. F. R.

Supreme Court of the United States.

WALTER D. SPROTT *v.* THE UNITED STATES.

A purchaser of cotton from the Confederate States, who knew that the money he paid for it went to sustain the rebellion, cannot in the Court of Claims recover the proceeds, when it has been captured and sold, under the Captured and Abandoned Property Act.

The moral turpitude of the transaction forbids that in a court of law he should be permitted to establish his title by proof of such a transaction.

The acts of the states in rebellion, in the ordinary course of administration of law, must be upheld in the interest of civil society, to which such a government was a necessity.

But the government of the Confederacy had no existence except as an organized treason. Its purpose while it lasted was to overthrow the lawful government and its statutes, its decrees, its authority can give no validity to any act done in, its service or in aid of its purpose.